IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 205

In re CLYDE WILSON SUMMERS,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Opinions Below

No opinion was expressed by the Supreme Court of Illinois, nor by the Committee on Character and Fitness of the Third Appellate District of Illinois.

Jurisdiction

The determination of the Supreme Court of Illinois now sought to be reviewed was made on March 22, 1944. The time within which to file a petition for a writ of certiorari was extended for seven days by order of Mr. Justice FRANKFURTER made on June 22, 1944. The jurisdiction of this Court is invoked under Section 237b of the Judicial Code (28 U. S. C. Sec. 344b). This Court exercised jurisdiction in a similar case involving admission to the Illinois bar. *Bradwell* v. *Illinois*, 16 Wall. 130.

Statement of the Case

A summary statement of the case is set forth in the petition.

ARGUMENT

POINT I

The right to practice law is a right of liberty and property protected by the Fourteenth Amendment.

Although the question has never been decided by this Court whether the right to practice law is a right of liberty and property which may not be denied without due process of law nor denied the equal protection of the laws, several such cases were decided by this Court before the adoption of the Fourteenth Amendment, and shortly after its adoption but under another clause, namely the privileges and immunities clause. Such cases include: *In re Secombe*, 19 How. 9; where mandamus was denied to review the disbarment of an attorney because it was held not to be the proper remedy; *In re Garland*, 4 Wall. 333, which held unconstitutional an Act of Congress restricting membership in the Federal bar to those who took an oath that they had never given aid or comfort to the Confederacy on the ground that such a law was *ex post facto* and a bill of attainder; and *Bradwell* v. *Illinois*, 16 Wall. 130, where a woman was denied admission to the bar of Illinois by the State Supreme Court on the ground of her sex, and this Court held that the privilege of the practice of law was not a privilege of United States citizens protected by the privileges and immunities clause of the Fourteenth Amendment.

These are the precedents, and all of them were decided on different grounds than those urged here. This question is therefore a novel one for this Court and we must turn for guidance to analogous cases, such as those involving licenses to engage in occupations other than the practice of law.

The case of *Dent* v. *West Virginia*, 129 U. S. 114, like this case, was addressed to the due process clause of the Fourteenth Amendment, but involved the validity of a statute setting certain conditions for admission to the practice of medicine. The Court's opinion, written by Mr. Justice FIELD, enunciated this principle, which would be broad enough to cover the practice of law, as well as the practice of medicine:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions" (at page 121).

A similar statement, somewhat broader in its application, which would also include the liberties here involved, is found in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589:

> "The liberty mentioned in that amendment . . . is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, . . ."

Many times has this Court been called upon to protect the right to engage in a lawful occupation or profession in

the face of infringement claimed to violate the due process clause of the Fourteenth Amendment. From these cases there clearly emerges the principle that the Fourteenth Amendment protects the right to carry on any ordinary occupation or profession as a means of making a livelihood and that the arbitrary denial of this right is a deprivation of liberty and of property without due process of law within the meaning of the Fourteenth Amendment. See: *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Truax v. Raich*, 239 U. S. 33, 41; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278; *Smith* v. *Texas*, 233 U. S. 630, 636.

This doctrine has been applied to many occupations and professions, which cannot be distinguished in principle from the practice of law. See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (operation of a laundry); *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266 (price-fixing of milk); *Smith* v. *Texas*, 233 U. S. 630, *supra* (railroad brakeman); *Liggett* v. *Baldridge*, 278 U. S. 105 (pharmacy); *Dent* v. *West Virginia*, 129 U. S. 114, *supra* (medicine); *Hurwitz* v. *North*, 271 U. S. 40 (medicine); *Semmler* v. *Oregon State Board*, 294 U. S. 608 (dentistry); *Stanley* v. *Public Utilities Com.*, 295 U. S. 76 (motor carriers).

POINT II

The denial to petitioner, although otherwise qualified, of admission to the practice of law because of his conscientious scruples against participation in war was a deprivation of liberty and property without due process of law in violation of the Fourteenth Amendment.

It is true that a State may require a license or the fulfillment of certain qualifications or the passing of prescribed tests as conditions precedent to the carrying on of an occupation, business or profession. Furthermore, moral character and fitness may form the basis for admission to the right to exercise an occupation or profession. *Hawker v. N. Y.*, 170 U. S. 189 (practice of medicine); *Douglas* v. *Noble*, 261 U. S. 165 (practice of dentistry). Nevertheless, the issuance of such a license and the admission to the privileges of such occupation, business or profession must be based upon reasonable conditions and may not be arbitrarily denied under the Fourteenth Amendment. See cases cited on page 4.

As the record will show, petitioner was denied admission to the practice of law in the State of Illinois by the Committee on Character and Fitness of the Third Appellate District, although his qualifications in all other respects were unquestioned, solely because he holds conscientious scruples against participation in war. This determination was upheld by the Illinois Supreme Court without opinion, and necessarily on the same grounds.

The petitioner set forth his views in detail in the hearing before the Committee on Character and Fitness, in which he disclosed that he is unwilling to participate in

war because of his religious and conscientious views, and that his local draft board had recognized the genuineness of his scruples by classifying him in Class IV-E as a conscientious objector. In making this determination the local draft board necessarily found that the petitioner's opposition to war is based upon "religious training and belief." The statute itself so requires. Section 5g of the Selective Training and Service Act of 1940 provides:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Thus the petitioner's opposition to war, for which the State of Illinois has rejected him as morally unfit to practice law, is based not upon personal whim or expediency, nor upon political or social views, but upon the deep and abiding compulsion of his inner religious convictions, since the demonstration of such a religious basis for conscientious objection is required in order to merit exemption. *U. S. v. Kauten*, 133 Fed. 2d 703, 708; *U. S. ex rel. Phillips v. Downer*, 135 Fed. 2d 521; *U. S. ex rel. Reel v. Badt*, 141 Fed. 2d 845.

The petitioner is therefore recognized as coming within the class of persons commonly called conscientious objectors, to whom Congress has seen fit to extend protection for their religious scruples, and there can be no question that a denial to the petitioner of rights to which he is otherwise entitled, solely because he is a conscientious objector, sharply interferes with his religious liberty.

It is no longer open to question that freedom of religion guaranteed under the First Amendment is protected

against State encroachment by the Fourteenth Amendment. *Barnette* v. *West Virginia*, 319 U. S. 624.

The infringement upon petitioner's liberties here involved is arbitrary, discriminatory and unreasonable, having no justification either in morals or reason, and therefore falls within the intendment of the Fourteenth Amendment prohibiting the denial of religious liberty without due process of law.

Not only is petitioner deprived of his liberty by the action here complained of, but he is also deprived of a valuable right of property, namely, the right to engage in the practice of the law.

It has been held many times by this Court that the right to engage in such professions as the practice of medicine or dentistry, as well as other occupations and businesses, constitutes a right of property which may not be taken without due process of law under the Fourteenth Amendment. See cases cited above on page 4.

There can be hardly any question that property rights have been damaged, if not totally destroyed, when the petitioner has been prevented from entering upon the practice of a profession for which he has spent years of his time and much of his capital in preparation, and this deprivation of petitioner's property was made without the due process of law required by the Fourteenth Amendment, since based upon an arbitrary, discriminatory and unreasonable act which springs only from intolerance and has no foundation in reason or justice.

POINT III

The denial to petitioner, although otherwise qualified, of admission to the practice of law because of his conscientious scruples against participation in war was a denial of the equal protection of the laws secured by the Fourteenth Amendment.

The equal protection of the laws requires that the laws of the State of Illinois governing admission to the practice of law be applied with equal hand to all qualified candidates for admission to the bar. It is unthinkable to our law that such great privileges as the right to practice the profession of law should be granted to some and withheld from others, equally fitted for that profession, solely on the basis of race, creed, color, religion or persuasion of belief. Indeed it is almost unthinkable that such a case as this could arise, except from the hysteria of war time, and even then no calm and judicial mind can fail to rise in outcry against the unfairness and intolerance of the discrimination here practiced against the petitioner by the State of Illinois.

While it is well understood that admission to the practice of law may be restricted to those who possess the necessary moral qualifications and good character, the test of moral fitness and character to be imposed must bear a reasonable relation to the ends sought to be attained, namely the preservation of high standards of ethics and integrity in the legal profession. There is no doubt, for instance, that exclusion from the bar on the basis of race would be a denial of equal protection of the laws under the Fourteenth Amendment, because the racial test would have no reasonable relation to the securing of proper standards for the

legal profession. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 where a license to operate a laundry was denied to an applicant solely because he was Chinese, and *U. S.* v. *Hirabayashi*, 320 U. S. 81 (at page 100) involving the current racial discrimination against persons of Japanese ancestry on the West Coast.

Even more deeply ingrained in our constitution than protection against racial discrimination is the protection which that instrument affords against religious discrimination. If, therefore, one may not be excluded from an occupation or profession by reason of his race, certainly he may not be excluded by reason of his religious beliefs. That a man entertains unusual and unpopular religious beliefs is no ground for excluding him from the practice of law, since this bears no reasonable relation to his fitness to become a lawyer. On the contrary, the exemplary character in general of members of the Religious Society of Friends (Quakers) and other pacifist groups, is well recognized and has long been respected by public opinion and by the courts. See the dissenting opinion of Chief Justice HUGHES in *U. S.* v. *Macintosh*, 283 U. S. 605, 630-632, and the history of the Quaker colony of Pennsylvania.

In other states than Illinois, conscientious objectors have been freely admitted to the bar, and in New York their admission has even been expedited when they were about to be drafted.* In general, pacifists have frequently been given positions of public trust, and include many eminent statesmen, judges and lawyers.

* See, Cornell: *The Conscientious Objector and The Law*, pages 112-113, John Day Co., New York, 1943.

CONCLUSION

It is therefore respectfully submitted that this Court grant the petition for certiorari in order to decide the novel and important constitutional question involved, and to protect and restore to the petitioner his constitutional rights.

Respectfully submitted,

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